



HIGH COURT OF NAMIBIA, MAIN DIVISION

**RULING ON THE APPLICATION FOR SPECIAL ARRANGEMENTS FOR  
VULNERABLE WITNESSES IN TERMS OF SECTION 158A OF THE CRIMINAL  
PROCEDURE ACT, ACT 51 OF 1977**

**CASE NO.: CC 11/2018**

In the matter between:

**THE STATE**

**APPLICANT**

versus

**PIETER VAN DER WESTHUIZEN**

**RESPONDENT**

**Neutral Citation:** *State v Van Der Westhuizen* (CC 11/2018) [2019] NAHCMD 267  
(2 July 2019)

**Coram:** RAKOW, AJ

**Heard:** 2 July 2019

**Delivered:** 2 July 2019

**Released:** 2 August 2019

**Flynote:** Criminal Law - Special Arrangements for Vulnerable Witnesses. Criminal Proceedings – Application in terms of section 158A of the Criminal Procedure Act, no. 51 of 1977.

**Summary:** Application brought under section 158A of the Criminal Procedure Act, no. 51 of 1977 to allow a witness to be considered a vulnerable witness for the purpose of this section and to invoke protection for her in the form of testifying in another room which is connected to the court room by means of closed circuit television as well as accompanied by a support person.

Held; that the state witness, the complainant Ms Kurz is a vulnerable witness as contemplated by section 158A of the Criminal Procedure Act, no. 51 of 1977.

Held; that the state witness will be allowed to be assisted by a support person.

Held; that the state witness will be allowed to provide her evidence.

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### **ORDER**

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The application by the state is granted.

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### **RULING**

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**RAKOW, AJ**

[1] The State brought an application in terms of section 158A of The Criminal Procedure Act, no. 51 of 1977 as amended. Their premise is that the complainant in this matter, Ms Kurz meets the requirements as set out in section 158A(3) which reads: for the purposes of this section a vulnerable witness is a person-

(b) against whom an offence of a sexual or indecent nature has been committed.

[2] The State possibly also referred to the qualification that she might suffer from undue stress whilst giving evidence as she has experienced panic attacks in the past, which also place her in the ambit of the definition of a vulnerable witness as contemplated under subsection (d) of section 158A(3) of the Criminal Procedure Act, no. 51 of 1977.

[3] The State further applied to allow for a support person as contemplated under subsection (2)(c) and (4) of section 158A *supra*, to assist Ms Kurz during her testimony and for the vulnerable witness to be allowed to give such evidence in a separate facility via closed circuit television and therefore invoking the arrangements as contemplated under 158A(2)(d).

[4] In essence the defense counsel agreed that the witness meets the requirement for vulnerability as set out under subsection 158A(3)(b) of the Act and has no objection that she is assisted by the support person as applied for by the State.

[5] Their concern however is with the measure suggested under 158A(2)(d) of the Act in that the witness is allowed to testify in a separate venue via closed circuit television. The gist of their argument is that the court will not be able to fully observe the witness due to the size of the screen, the distance the court will sit from the screen, the fact that the screen only partially show the witness, the fact that the witness will only be able to view the back of the council, etc.

[6] Their concern is mainly that this will impact on the fair trial right of the accused as guaranteed under Article 12 of the Namibian Constitution and especially regarding the right of the accused to confront his accusers, and in this instance via his representative. The defense counsel's submission is that a less extreme measure should be considered for example screening off the accused from the sight of the witness, to allow her to testify inside the witness box, in the presence of the court, that will allow the court to observe her demeanor better.

[7] When considering the application brought by the State it is important to recognize that the right of an accused to a public trial is not absolute and that there are well recognized exceptions to the rule, which exceptions may be justified in terms of the limitation clause contained in the Namibian Constitution.

[8] Section 158A(2) allows for a number of arrangements to be made including under subsection (2)(e) the taking of any other steps that in the opinion of the court are expedient and desirable in order to facilitate the giving of evidence by the vulnerable witness concerned. By reading of subsection (2): “Special arrangements” means one or more of the following steps: it further seems that the legislature intended for any combination of steps to be available to the court, including a combination of steps as set out under subsection 2 combined with any other steps or measures expedient and desirable to the court.

[9] In terms of subsection 158A(7) the court, when considering an order under this section, shall consider the following matters:

- (a) the interest of the state in adducing the complete and undistorted evidence of a vulnerable witness concerned;
- (b) the interests and well-being of the witness concerned;
- (c) the availability of necessary equipment and locations;
- (d) the interests of justice in general.

[10] In considering the application before court, the court is mandatory to consider these four instances. The State stated their interest in adducing complete and undistorted evidence and alluded to the interest and well-being of the witness, indicating that she is a witness that will testify about an offence or offences of a sexual or indecent nature that has been committed against her. The State further alluded to the availability of a separate location with closed circuit television that was available for this purpose. The only dispute in essence, was whether it was in the interest of justice or not and specifically whether the measure suggested by the state for the location and way in

which evidence should be given, will impact negatively on the right to a fair trial of the accused.

[11] This court finds that allowing the application that the witness gives her testimony in another room which is connected to the court room by means of closed circuit television will not necessarily impact negatively on the fair trial rights of the accused in a manner that is not in the interest of justice in general.

[12] The safeguard in sub-article (6) remains available throughout the proceedings related to this specific witness and allows for the court to give proper guidance where there is difficulty on the side of the accused, his or her legal representative, the prosecutor in the case and the presiding officer to hear the witness and to observe the witness while such witness gives evidence.

[13] In the result;

The application by the State is granted.

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E. RAKOW  
ACTING JUDGE

APPEARANCES:

FOR THE APPLICANT:

P KHUMALO (with him I  
Shikerete)  
Of Office of the Prosecutor-General, Windhoek

FOR THE RESPONDENT:

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Of MacRobert Attorneys Inc., Pretoria